A

Reza Fraaji Khodavirdi & Anor v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS P-05–230 AND 231–09 OF 2012 (IRN)
MOHTARUDIN BAKI, AHMADI ASNAWI AND ABDUL RAHMAN SEBLI JJCA
23 JANUARY 2015

C

Criminal Law — Dangerous drugs — Trafficking — s 39B(1)(a) — Trafficking in methamphetamine — Appeal against conviction and sentence — Drugs found in cereal boxes inside appellants' bag without any of their personal belongings at Bayan Lepas International Airport — Whether appellant was in possession of drugs with view to traffic — Whether appellants defence probable — Presumption of knowledge — Whether second appellant's conduct indicative of his knowledge as to the existence of drugs — Whether the trial judge had made a finding as to whether the presumption had been rebutted by second appellant — Whether appellate interference warranted — Dangerous Drugs Act 1952 ss 37(d) & 39B(1)

D

E

The appellants, Iranian nationals, were separately charged but jointly tried in the High Court for drug trafficking. At the conclusion of the trial, both the appellants were found guilty and sentenced to death. They appeal against conviction and sentence. The material facts were that the appellants who had arrived from Dubai via Kuala Lumpur International Airport, were each carrying a trolley bag. Upon inspection of both the bags, the police found that the first appellant's bag contained seven cereal boxes while the second appellant's bag contained six cereal boxes. All the said cereal boxes contained crystalline substances suspected to be 'syabu'. Nothing else was found inside the bags, not even their personal belongings. The cereal boxes were not even hidden in any special compartment of the bag. The seven cereal boxes found in the first appellant's bag were found to contain 11,430.6g of methamphetamine which was the subject matter of the charge against the first appellant while the six cereal boxes found in the bag carried by the second appellant contained 9,561.4g of the same drug, the subject matter of the charge against him. The amount of drugs carried by the first appellant was more than 200 times the amount that would trigger the presumption of trafficking under s 37(da)(xvi) of the Dangerous Drugs Act 1952 ('the DDA'). In the case of the second appellant it was more than 150 times. On those facts, the trial judge found that a prima facie case of trafficking had been established against each of the appellants and that the presumption of trafficking under s 37(da) of the DDA applied against both of them. The defence case which was common to both appellants was that the two bags containing the drugs were not theirs but rather

F

G

H

I

belonged to a fellow Iranian by the name of 'Ali' who had asked the first appellant to check them in at Dubai Airport as he ('Ali') had excess baggage and could not check in the two bags under his name. When they arrived at Bayan Lepas International Airport 'Ali' was nowhere to be seen and they were arrested with the bags in their custody and control. The trial judge found that both appellants failed to cast any reasonable doubt in the prosecution's case and that the prosecution had proved its case beyond any reasonable doubt. Before this court, the first appellant contended that the trial judge had failed to give maximum evaluation to his defence. In particular, it was pointed out that the trial judge failed to consider the first appellant's explanation that the cereal boxes had been bought by someone else before his arrival in Dubai which was supported by the purchase receipts found in the second appellant's possession. It was argued that the trial judge ought to have drawn an inference favourable to the first appellant that the cereal boxes had been opened and filled with the drugs without his knowledge before he checked in the two bags at Dubai Airport. As for the second appellant, the following two issues were raised: (a) that the trial judge did not examine the entire evidence in determining whether the second appellant's conduct is indicative of his knowledge as to the existence of the drugs; and (b) whether the presumption of trafficking under s 37(da) applied and if so, whether the trial judge had made a finding as to whether the presumption had been rebutted by the second appellant.

Held, dismissing both appeals and affirming the conviction and sentence:

(1) There was no semblance of truth in the first appellant's claim that the bag belonged to 'Ali'. If indeed the bag belonged to 'Ali' and that his only interest in the bag was to check in the bag on behalf of 'Ali' at Dubai Airport, there was no reason for him to collect the bag as if it was his own at Bayan Lepas International Airport. His conduct clearly showed that the bag was his. Further, it cannot be a coincidence that 'Ali' was nowhere to be seen at Bayan Lepas International Airport when he arrived. The first appellant could not therefore have been an innocent carrier without knowledge (see para 14).

(2) Even where there is affirmative evidence of possession to activate the presumption of trafficking, the presumption under s 37(d) is still applicable and must be invoked by the court. The burden was therefore on the second appellant to prove on the balance of probabilities that he had no knowledge of the drugs and not for the prosecution to prove to the contrary. Since the trial judge found 'Ali' to be a fictitious character, there was no question that the second appellant had not succeeded in rebutting the presumption of knowledge under s 37(d). Therefore the presumption remained unrebutted by the second appellant (see para 18).

(3) Since it was not part of the second appellant's defence that the drugs were not for the purpose of trafficking, there was no reason why the trial judge

had to consider whether the drugs were for the purpose of trafficking or otherwise in rebuttal of the presumption under s 37(da). What the trial judge had to consider was whether the second appellant had rebutted the presumption of knowledge under s 37(d) as that was the only defence raised by him in answer to the prima facie case of trafficking established against him at the close of the prosecution case (see para 25).

(4) As the second appellant's case stood, not a shred of evidence was adduced by him to show that the drugs were not for the purpose of trafficking. In fact, nothing was said of the purpose for which such a large amount of drugs was carried by him. Consequently there was immaterial before the court for the trial judge to make a finding in the second appellant's favour that the drugs were probably not for the purpose of trafficking. The presumption of trafficking therefore remained unrebutted at the close of the defence case (see para 27).

[Bahasa Malaysia summary

Perayu-perayu adalah warganegara Iran, adalah dituduh berasingan tetapi didengar bersama di Mahkamah Tinggi kerana pengedaran dadah. Di akhir kesimpulan perbicaraan, kedua-dua perayu didapati bersalah dan dikenakan hukuman mati. Mereka merayu terhadap sabitan dan hukuman. Fakta material adalah bahawa perayu yang tiba dari Dubai melalui Lapangan Terbang Antarabangsa Kuala Lumpur, masing-masing memegang beg troli. Semasa pemeriksaan kedua-dua beg, polis mendapati bahawa beg perayu pertama mengandungi tujuh kotak bijirin manakala beg perayu kedua mengandungi enam kotak bijirin. Kesemua kotak bijirin mengandungi bahan kristal yang disyaki adalah 'syabu'. Tiada apa-apa lagi yang didapati di dalam beg, malahan tiada barang peribadi mereka. Kotak bijirin tidak disembunyikan di dalam apa-apa bahagian khusus di dalam beg. Tujuh kotak bijirin dijumpai di dalam beg perayu pertama didapati mengandungi 11,430g methamphetamine yang mana adalah perkara subjek pertuduhan terhadap perayu pertama, manakala enam kotak bijirin yang dijumpai di dalam bag yang dibawa oleh perayu kedua mengandungi 9,561.4g dadah yang sama, perkara subjek pertuduhan terhadapnya. Jumlah dadah yang dibawa oleh perayu pertama adalah 200 kali lebih daripada jumlah yang akan menyebabkan anggapan pengedaran di bawah s 37(da)(xvi) Akta Dadah Berbahaya 1952 (ADB). Dalam kes perayu kedua ia adalah lebih dari pada 150 kali. Berdasarkan fakta itu, hakim perbicaraan mendapati bahawa satu kes prima facie pengedaran telah terbukti terhadap kedua-dua perayu dan bahawa anggapan pengedaran di bawah s 37(da) ADB terpakai ke atas mereka. Kes pembelaan yang sama kepada kedua-dua perayu adalah bahawa dua beg yang mengandungi dadah bukanlah kepunyaan mereka tetapi kepunyaan rakan Iran mereka yang bernama 'Ali' yang telah meminta perayu pertama untuk mendaftar mereka masuk di Lapangan Terbang Dubai kerana dia ('Ali') mempunyai muatan beg berlebihan dan tidak boleh mendaftar masuk dua beg di bawah namanya. Apabila mereka

tiba di Lapangan Terbang Bayan Lepas 'Ali' tidak kelihatan dan mereka ditahan bersama beg dalam jagaan dan kawalan mereka. Hakim perbicaraan mendapati kedua-dua perayu gagal untuk menimbulkan apa-apa keraguan munasabah dalam kes pendakwaan dan bahawa pendakwaan telah membuktikan kes mereka melampaui apa-apa keraguan munasabah. Di hadapan mahkamah ini, perayu menegaskan bahawa hakim perbicaraan gagal memberikan penilaian maksimum terhadap pembelaannya. Terutamanya, ia adalah dikatakan bahawa hakim perbicaraan gagal untuk mempertimbangkan penjelasan perayu pertama bahawa kotak bijirin telah dibeli oleh orang lain sebelum ketibaannya di Dubai yang mana disokong oleh resit belian yang didapati dalam milikan perayu kedua. Adalah dihujahkan bahawa hakim perbicaraan sepatutnya membuat inferens memihak kepada perayu pertama bahawa kotak bijirin telah dibuka dan diisi dengan dadah tanpa pengetahuannya sebelum dia mendaftar masuk dua beg itu di Lapangan Terbang Dubai. Untuk perayu kedua pula, dua isu berikut telah ditimbulkan: (a) bahawa hakim perbicaraan tidak memeriksa keseluruhan keterangan dalam menentukan sama ada kelakuan perayu kedua menunjukkan pengetahuannya terhadap kewujudan dadah; (b) sama ada anggapan pengedaran di bawah s 37(da) terpakai dan jika ya, sama ada hakim perbicaraan telah membuat dapatan sama ada anggapan itu telah dipatahkan oleh perayu kedua.

Diputuskan, menolak kedua-dua rayuan dan mengesahkan sabitan dan hukuman.

(1) Tiada persamaan kebenaran dalam dakwaan perayu pertama bahawa beg itu kepunyaan 'Ali'. Jika benar beg itu kepunyaan 'Ali' dan kepentingannya terhadap beg tersebut hanya untuk mendaftar masuk beg tersebut bagi pihak 'Ali' di Lapangan Terbang Dubai, tiada alasan untuknya mengambil beg seperti kepunyaannya sendiri di Lapangan Terbang Antarabangsa Bayan Lepas. Kelakuannya jelas menunjukkan bahawa beg itu adalah miliknya. Selanjutnya, ia tidak boleh menjadi kebetulan bahawa 'Ali' tidak kelihatan di mana-mana di Lapangan Terbang Antarabangsa Bayan Lepas apabila dia tiba. Perayu pertama oleh itu tidak boleh menjadi pembawa tidak bersalah tanpa pengetahuan (lihat perenggan 14).

(2) Apabila terdapat keterangan afirmatif milikan untuk mengaktifkan anggapan pengedaran, anggapan di bawah s 37(d) masih terpakai dan mesti digunakan oleh mahkamah. Beban oleh itu adalah atas perayu kedua untuk membuktikan atas imbangan kebarangkalian bahawa dia tiada pengetahuan terhadap dadah dan bukan untuk pendakwaan membuktikan sebaliknya. Memandangkan hakim perbicaraan mendapati 'Ali' adalah watak fiksyen, tiada persoalan bahawa perayu kedua tidak berjaya mematahkan anggapan pengetahuan di bawah s 37(d). Oleh itu anggapan kekal tidak dipatahkan oleh perayu kedua (lihat perenggan 18).

(3) Oleh kerana ia bukanlah sebahagian pembelaan perayu kedua bahawa dadah itu bukanlah untuk tujuan pengedaran, tiada sebab mengapa hakim perbicaraan perlu mempertimbangkan sama ada dadah adalah untuk tujuan pengedaran atau sebaliknya dalam mematahkan anggapan di bawah s 37(d). Apa yang hakim perbicaraan perlu pertimbangkan adalah sama ada perayu kedua telah mematahkan anggapan pengetahuan di bawah s 37(d) kerana itu adalah satu-satunya pembelaan yang ditimbulkan oleh perayu kedua dalam menjawab kes prima facie pengedaran yang dibuktikan terhadapnya di akhir kes pendakwaan (lihat perenggan 25).

(4) Sebagaimana nyata kes perayu kedua, tiada sedikit pun keterangan telah dikemukakan olehnya untuk menunjukkan bahawa dadah itu adalah bukan untuk tujuan pengedaran. Malahan, tiada apa yang diperkatakan terhadap tujuan yang mana sejumlah besar dadah dibawa olehnya. Akibatnya adalah tidak material di hadapan mahkamah untuk hakim perbicaraan membuat dapatan memihak kepada perayu kedua bahawa dadah itu mungkin bukan untuk tujuan pengedaran. Anggapan pengedaran oleh itu kekal tidak dipatahkan di akhir kes pembelaan (lihat perenggan 27).]]]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 763–910.

Cases referred to

Cohen Lorraine Philis & Anor v PP and another appeal [1989] 3 MLJ 289; [1989] 1 CLJ Rep 18, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89; [1968] 1 LNS 116, PC (refd)
PP v Zulkifli bin Arshad [2011] 1 MLJ 599; [2010] 6 CLJ 121, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2) , 37(d), 37(da), 37(da)(xvi), 39A (1), 39B

Appeal from: Criminal Trial Nos 45–47–10 and 45–48–10 of 2011(Court of Appeal, Putrajaya)

Tina Ong (Sivananthan) for the first appellant.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the second appellant.
Tengku Intan Suraya bt Tengku Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli JCA:

[1] The appellants, both Iranian nationals were separately charged but jointly tried in the High Court at Penang for drug trafficking and the charges against them are as follows:

> Charge against the 1st Appellant
>
> Bahawa kamu pada 17.05.2011 jam lebih kurang 7.40 malam, berhampiran carousel Ketibaan Domestik Lapangan Terbang Antarabangsa Bayan Lepas, Pulau Pinang di dalam Daerah Barat Daya, di dalam Negeri Pulau Pinang telah mengedar dadah merbahaya iaitu Methamphetamine seberat 11430.6 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah s.39B(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s.39B(2) Akta yang sama.
>
> Charge against the 2nd Appellant
>
> Bahawa kamu pada 17.05.2011 jam lebih kurang 7.45 malam, berhampiran carousel Ketibaan Domestik Lapan Terbang Antarabangsa Bayan Lepas, Pulau Pinang di dalam Daerah Barat Daya, di dalam Negeri Pulau Pinang telah mengedar dadah merbahaya iaitu Methamphetamine seberat 9561.4 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah s.39B(a) Akta dadah Berbahaya 1952 dan boleh dihukum di bawah s.39B(2) Akta yang sama.

[2] At the conclusion of the trial both appellants were found guilty and sentenced to death. This is their appeal against conviction and sentence. The material facts are as follows. On the date and at the time specified in the charges, the complainants Detective Corporal Wan Azmi Wan Mat Isa (PW8) and Detective Corporal Ghazali Abdullah (PW9) together with 11 other police personnel were on observation duties at the domestic arrival hall of the Bayan Lepas International Airport Penang when they saw the first and second appellants coming out from the wash room, one after the other within a matter of seconds. The duo had just arrived from Dubai, United Arab Emirates via Kuala Lumpur International Airport and were each carrying a trolley bag.

[3] Upon inspection the bag (P35) that the first appellant carried was found to contain seven cereal boxes containing crystalline substances suspected to be 'syabu'. Nothing else was found inside the bag, not even personal belongings. The cereal boxes were not even hidden in any special compartment of the bag, meaning to say they could be seen if one were to open the bag.

[4] As for the bag carried by the second appellant (P15B), the police found six cereal boxes containing crystalline substances suspected to be 'syabu'. It was the second appellant himself who opened the bag by turning the combination numbers of the lock. Other than the six boxes, nothing else was found inside the bag, not even personal belongings. As was the case with the exhibits found in the first appellant's bag, the incriminating exhibits found in the second

appellant's bag were also not hidden in any special compartment of the bag. A

[5] The crystalline substances were later sent to the chemist for analysis. The seven cereal boxes found in the first appellant's bag were found to contain 11,430.6g of methamphetamine which is the subject matter of the charge against the first appellant while the six cereal boxes found in the bag carried by the second appellant contained 9,561.4g of the same drug, the subject matter of the charge against him. The amount of drug carried by the first appellant was more than 200 times the amount that would trigger the presumption of trafficking under s 37(da)(xvi) of the Dangerous Drugs Act 1952 ('the DDA'). In the case of the second appellant it was more than 150 times. B C

[6] On these facts the learned trial judge found, as he inevitably would that a prima facie case of trafficking had been established against each of the appellants and that the presumption of trafficking under s 37(da) of the DDA applied against both of them. When the defence was called both appellants chose to give evidence on oath. Their defence has been set out in detail by the learned trial judge at pp 44–48 Vol 1 of the appeal record. We do not find it necessary to restate them in full in this judgment. D E

[7] Essentially the defence case which was common to both appellants is that the two bags containing the drugs did not belong to them. They belonged to a fellow Iranian by the name of 'Ali' who had asked the first appellant to check them in at Dubai Airport as he ('Ali') was having excess baggage and could not check in the two bags under his name. F

[8] According to the first appellant, at first he was reluctant to help but relented after 'Ali' insisted and assured him that the bags only contained food and drinks and even showed him the purchase receipts for the goods. He said he then checked in 'Ali's bags and put the purchase receipts in his passport which he passed to the second appellant. When they arrived at Bayan Lepas International Airport 'Ali' was nowhere to be seen and they were arrested with the bags in their custody and under their control. G

[9] Having given careful consideration to the defence case separately, the learned trial judge found that both appellants failed to cast any reasonable doubt in the prosecution's case and that the prosecution had proved its case beyond any reasonable doubt. H

[10] Before us the first appellant raised only one issue, ie that the learned trial judge failed to give maximum evaluation to his defence. In particular it was pointed out that the learned trial judge failed to consider the first appellant's explanation that the cereal boxes had been bought by someone else before his arrival in Dubai on 14 May 2011, which according to counsel is supported by I

the purchase receipts (P65, P66) both dated 13 May 2011 found in the second appellant's possession. It was argued that the learned trial judge ought to have drawn an inference favourable to the first appellant that the cereal boxes had been opened and filled with the drugs without his knowledge before he checked in the two bags at Dubai Airport.

[11] Having gone through the record of appeal and the grounds of judgment carefully we found no substance to the argument. It is clear to us that the learned trial judge had adequately considered the first appellant's explanation that the bag (P35) belonged to 'Ali' and that he was merely doing 'Ali' a favour by checking it in on 'Ali's behalf at Dubai Airport.

[12] The explanation was clearly rejected by the learned trial judge as he found 'Ali' to be 'concocted and not a real person'. The finding that 'Ali' is a fictitious character renders wholly insignificant the first appellant's claim that the bag belonged to 'Ali' and that the cereal boxes inside the bag had probably been filled with the drugs at the time he checked it in.

[13] We note that in finding 'Ali' to be a fictitious character the learned trial judge had subjected the first appellant's explanation to a very careful assessment and evaluation. We have no reason to disturb his finding of fact. With this finding by the learned trial judge the whole substratum of the first appellant's defence and indeed that of the second appellant collapsed to the ground.

[14] For ourselves we find no semblance of truth in the first appellant's claim that the bag belonged to 'Ali'. If indeed the bag belonged to 'Ali' and that his only interest in the bag was to check in the bag on behalf of 'Ali' at Dubai Airport, there was no reason for him to collect the bag as if it was his own at Bayan Lepas International Airport. His conduct clearly shows that the bag was his. Further, it cannot be a coincidence that 'Ali' was nowhere to be seen at Bayan Lepas International Airport when he arrived. The first appellant could not therefore have been an innocent carrier without knowledge.

[15] As for the second appellant, two issues were raised:

(a) that the learned trial judge did not examine the entire evidence in determining whether the second appellant's conduct is indicative of his knowledge as to the existence of the drugs; and

(b) whether the presumption of trafficking under s 37(da) applied and if so whether the learned trial judge had made a finding as to whether the presumption had been rebutted by the second appellant.

[16] As regards issue (a), knowledge is presumed by s 37(d) of the DDA as the drugs were found in the second appellant's custody: see *Muhammed bin*

Hassan v Public Prosecutor [1998] 2 MLJ 273; [1998] 2 CLJ 170 (FC) where Chong Siew Fai CJ (Sabah and Sarawak) delivering the judgment of the court said at pp 288 (MLJ); 190 (CLJ):

> The 'deemed' state of affairs in s 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. Such presumptions as under s.37(d) (and for that matter, the one under s 37(da) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s.37(d) by the prosecution), the court must in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves to the contrary. *Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make*. (Emphasis added.)

[17] The presumption under s 37(d) stands on its own and operates independently of the presumption under s 37(da). We are not aware of any rule of law to say that when the presumption of trafficking under s 37(da) is invoked the presumption of knowledge under s 37(d) ceases to have effect. The judgment in *Muhammed bin Hassan* merely says that the presumption under s 37(d) cannot be used to further invoke the presumption of trafficking under s 37(da).

[18] Thus, even where there is affirmative evidence of possession to activate the presumption of trafficking, the presumption under s 37(d) is still applicable and must be invoked by the court. The burden was therefore on the second appellant to prove on the balance of probabilities that he had no knowledge of the drugs and not for the prosecution to prove to the contrary: *Public Prosecutor v Yuvaraj* [1962] 2 MLJ 89; [1968] 1 LNS 116 (PC).

[19] Since the learned trial judge found 'Ali' to be a fictitious character, there is no question that the second appellant had succeeded in rebutting the presumption of knowledge under s 37(d). Therefore the presumption remained unrebutted by the second appellant.

[20] With regard to the two purchase receipts referred to by learned counsel for the first appellant, it was submitted by learned counsel for the second appellant that these receipts were inadmissible and had wrongly been admitted in evidence as no oral evidence was led as to where they were found. Our view is that these receipts proved nothing either for the prosecution or for the defence but whatever may be their evidential value the incontrovertible fact is that the bag (P15B) was in the second appellant's custody at the time of his arrest, thus triggering the presumption of knowledge under s 37(d) of the DDA.

[21] As for the second issue raised by learned counsel for the second appellant, the presumption of trafficking under s 37(da) clearly applied as the second appellant was in possession of the drugs: *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599; [2010] 6 CLJ 121 (FC). It was therefore incumbent on the second appellant to rebut the presumption on the balance of probabilities. Failure to do so would have the consequence of a conviction: *Public Prosecutor v Yuvaraj*.

[22] It was submitted that the learned trial judge seriously misdirected himself when he failed to rule whether the presumption of trafficking had been rebutted by the second appellant despite having invoked the presumption at the close of the prosecution case. We find it true that the learned trial judge did not make such ruling but what is also true is that the second appellant did not raise trafficking, or rather 'no trafficking' as a defence. His defence was that he knew nothing about the drugs as he believed 'Ali's story that the bag contained food and drinks.

[23] Clearly therefore, despite bearing the burden of rebutting the presumption of trafficking under s 37(da) the second appellant chose not to discharge that burden. For all practical purposes his defence to the trafficking charge was that since he had no knowledge of the drugs, he could not be in possession of the drugs and since he was not in possession of the drugs he could not be trafficking in the drugs.

[24] It appears that the second appellant was equating the defence of 'no knowledge' with the defence of 'no trafficking'. This is false of course as absence of knowledge, which is a necessary ingredient of the offence of possession under s 12(2) and trafficking under s 39B are two distinct offences under the DDA. In this regard it is important to remember that the appellant was called upon to answer a trafficking charge and not a possession charge.

[25] Since it was not part of the second appellant's defence that the drugs were not for the purpose of trafficking, we see no reason why the learned trial judge had to consider whether the drugs were for the purpose of trafficking or otherwise in rebuttal of the presumption under s 37(da). What the learned trial judge had to consider was whether the second appellant had rebutted the presumption of knowledge under s 37(d) as that was the only defence raised by him in answer to the prima facie case of trafficking established against him at the close of the prosecution case.

[26] Had the second appellant admitted knowledge (and therefore 'possession') but denied 'trafficking' and went on to explain what the purpose of the drugs were, as was done by the appellant in the Supreme Court case of *Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal* [1989] 3

MLJ 289; [1989] 1 CLJ Rep 18, then and then only would the learned trial judge be duty bound to consider whether the drugs were for the purpose of trafficking or otherwise. In that situation if the second appellant succeeded in rebutting the presumption of trafficking, he could only be convicted of the lesser offence of possession, custody or control under s 12(2) read with s 39A(1) but not for the offence of trafficking under s 39B. He is not entitled to a full acquittal though as possession, custody or control are offences by themselves.

[27] However, as the second appellant's case stood, not a shred of evidence was adduced by him to show that the drugs were not for the purpose of trafficking. In fact nothing was said of the purpose for which such large amount of drug was carried by him. Consequently there was no material before the court for the learned trial judge to make a finding in the second appellant's favour that the drugs were probably not for the purpose of trafficking. The presumption of trafficking therefore remained unrebutted at the close of the defence case.

[28] What is plain and obvious is that the second appellant's explanation was to try to convince the learned trial judge that 'Ali' existed in flesh and blood and not a mere figment of his imagination and that therefore he had established his defence of no knowledge or innocent carrier.

[29] If the learned trial judge had accepted the second appellant's defence of no knowledge as being more probable than not, he would not only have been acquitted of the trafficking charge but he would also not be liable to be convicted of the lesser offence of possession, custody or control under s 12(2) read with s 39A(1) as absence of knowledge would mean that he was not even in mens rea possession, custody or control of the drugs. The fact however is that the learned trial judge disbelieved his story as he found 'Ali' to be a fictitious character. He had therefore failed to rebut the presumption of knowledge under s 37(d).

[30] In the face of such finding of fact by the learned trial judge, the possibility that the second appellant could have succeeded in rebutting the presumption of trafficking does not arise at all, even if the learned trial judge had addressed his mind to the presumption under s 37(da) in dealing with the second appellant's case. Thus the failure by the learned trial judge to rule whether the second appellant had rebutted the presumption of trafficking is of no consequence as far as the final verdict is concerned. We therefore found no merit in the second and last ground of appeal raised by the second appellant.

[31] For these reasons we found no justification to interfere with the decision of the learned trial judge. We were satisfied that the convictions are

safe and we therefore dismissed both appeals and affirmed the conviction and sentence.

Both appeals dismissed and conviction and sentence affirmed.

Reported by Ashgar Ali Ali Mohamed